TESTIMONY OF
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GENERAL COUNSEL
NFL PLAYERS ASSOCIATION

BEFORE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

"Oversight Hearing on the Arbitration Process of the National Football League Players Association"

ON

DECEMBER 7, 2006

Mr. Chairman, Members of the Subcommittee, I am Richard Berthelsen, General Counsel to the NFL Players Association ("NFLPA"). I appear today at the Subcommittee's invitation to discuss the arbitration procedure under the NFLPA's Regulations Governing Contract Advisors.

We are aware that some Members of Congress have expressed concern with respect to a specific pending arbitration proceeding concerning Mr. Carl Poston. Previously, the NFLPA addressed those concerns in writing and copies of that correspondence are submitted to the Subcommittee. I do not intend to address the specifics of that pending arbitration proceeding today. Rather, I will discuss the arbitration procedures as they are implemented under the NFLPA Regulations Governing Contract Advisors.

The NFLPA is the exclusive bargaining representative of NFL players, pursuant to § 9(a) of the National Labor Relation Act ("NLRA"), 29 U.S.C. § 159(a). See NFL Collective Bargaining Agreement ("CBA"), Art. VI, sec. 1. The NFLPA has, pursuant to the NLRA, the sole and exclusive right to bargain with NFL clubs with respect to all terms and conditions for the employment of NFL players. Nonetheless, the NFLPA has delegated certain of its rights to a limited number of sports agents (referred to as "Contract Advisors"), who are permitted to negotiate, on behalf of the NFLPA, the individual salaries of those players who select them for that purpose. Because, as explained hereafter, the authority of an NFLPA agent to negotiate on behalf of any NFL player derives from the federal labor law authority delegated to the agent by the NFLPA, it is well settled that the NFLPA (and other players' unions) has the absolute right to appoint its agents and to regulate the conduct of such agents as the union sees fit.

The NFLPA takes its responsibility to promote the interests of NFL players seriously and recently agreed with the NFL on an historic labor agreement. The agreement guarantees significant increases in the overall compensation and benefits received by all NFL players and guarantees labor peace in professional football for many years to come.

NFLPA Agent Regulations

In order to ensure that NFLPA agents fulfill their delegated responsibilities to the satisfaction of the Board of Representatives of the NFLPA, that Board

promulgated a comprehensive set of regulations ("Agent Regulations") governing the conduct of NFLPA agents. A copy of the Regulations has been submitted to the Subcommittee. As a condition to receiving delegated authority from the NFLPA, the agents agree, in writing, to be bound by the NFLPA Agent Regulations. Indeed, all NFLPA agents execute an "Application For Certification As An NFLPA Contract Advisor." That Application states: "In submitting this Application, I agree to comply with and be bound by the [Agent] Regulations." The Application makes clear that the terms therein "shall constitute a contract between the NFLPA and myself." This is referred to herein as the "NFLPA Agent Contract." The Agent Regulations are extremely broad and cover all facets of the agent's duties. See Agent Regulations § 1(B).[1]

To become a Contract Advisor and be able to receive the delegated authority from the NFLPA, to represent individual players in salary negotiations with NFL Clubs, one must undergo a background examination, meet educational requirements, engage in continuing education, and agree to be bound by the NFLPA's Regulations Governing Contract Advisors. The NFLPA's Regulations have been repeatedly upheld by the federal courts. See Black v. Nat'l Football League Players Ass'n, 87 F.Supp. 2d 1 (D.D.C. 2000); Poston v. Nat'l Football League Players Ass'n, 2002 WL 31190142 (E.D.Va. Aug. 26, 2002).

[1] The Agent Regulations set forth a "Code of Conduct" which identifies twenty affirmative responsibilities, and twenty-nine explicitly prohibited acts. See Agent Regulations § 3. The Agent Regulations also direct the agent to use a pre-printed form to govern his/her relationship with the player-client, and caps the agent's fees. See Agent Regulations § 4.

Most importantly with reference to Arbitration Procedures, the Agent Regulations set forth, at Section 6, a comprehensive regime for disciplining agents who violate the Regulations. This regime is specifically incorporated into the NFLPA Agent Contract ("the exclusive method for challenging any such [disciplinary] action is through the procedure set forth in the [Agent] Regulations"). The procedure for disciplining agents under the Agent Regulations is as follows: The President of the NFLPA appoints a Committee on Agent Regulation and Discipline ("CARD"), consisting of active or retired players. CARD decides whether to initiate disciplinary action. If CARD decides that discipline is appropriate, it may initiate a disciplinary proceeding by filing a written complaint. See Agent Regulations § 6(B). The agent is permitted to file an answer, and to present a defense in writing. See Agent Regulations § 6(C). The Agent Regulations do not require CARD to hold any hearing. Rather, within ninety days after receiving the agent's answer, CARD must advise the agent "of the nature of the discipline, if any, which the Committee proposes to impose." See Agent Regulations § 6(D) (emphasis added). That is, CARD does not impose any discipline itself; rather, it merely proposes discipline. If the agent agrees with the discipline, the agent can accept CARD's proposal. See Agent Regulations § 6(E) ("The failure of Contract Advisor to file a timely appeal shall be deemed to constitute an acceptance of the discipline which shall then be promptly imposed"). Conversely, if the agent contests CARD's proposed discipline, then:

> The Contract Advisor against whom a Complaint has been filed under this Section may appeal [CARD's] proposed disciplinary action to the outside Arbitrator by filing a written Notice of Appeal with the Arbitrator within twenty (20) days following Contract Advisor's receipt of notification of the proposed disciplinary action.

See Agent Regulations § 6(E). If the agent rejects CARD's proposed discipline by filing an appeal to the arbitrator, there is an "automatic stay of any disciplinary action" in most circumstances. Id.

Section 6(F) of the Agent Regulations makes clear that the arbitrator who will decide the case "shall be the same Arbitrator selected to serve pursuant to Section 5." Section 5 of the Agent Regulations, in turn, promulgates rules pertaining to arbitration generally.[2] Section 5 makes clear that "[t]his arbitration procedure shall be the exclusive method for resolving any and all disputes that may arise" (emphasis added). And Section 5(D) of the Agent Regulations permits the NFLPA to select the arbitrator: "The NFLPA shall select a skilled and experienced person to serve as the outside impartial Arbitrator for all cases arising hereunder."

NFLPA Authority To Select Arbitrator

As noted, the NFLPA has the exclusive authority under § 9(a) of the NLRA to engage in employment bargaining with NFL Clubs on behalf of all NFL players. As a result of this exclusive authority, "player agents are permitted to negotiate

[2] The Agent Regulations provide for arbitrations between players and agents, between agents and the NFLPA, and between agents. Section 5 sets forth uniform rules for these arbitrations, subject to the more specific rules promulgated in other sections addressing each specific kind of dispute.

player contracts in the NFL only because the NFLPA has designated a portion of its exclusive representational authority to them." White v. Nat'l Football League, 92 F. Supp. 2d 918, 924 (D. Minn. 2000) (emphasis added). And, because the NFLPA has the sole authority under federal law to represent its bargaining unit, it has total discretion in determining whether to delegate its bargaining authority, and to whom. See In re David Dunn, CV 05-1000, (C.D. Cal. March 1, 2006) ("Section 9(a) of the National Labor Relations Act provides that the NFLPA's Collective Bargaining Agreement gives the NFLPA, as the exclusive bargaining representative of NFL players, sole discretion in choosing its agents") (emphasis added). As stated by one court regarding the similar labor law authority of the National Basketball Players Association ("NBPA") to delegate authority to agents:

> As the exclusive representative for all of the NBA players, the NBPA is legally entitled to forbid any other person or organization from negotiating for its members. Its right to exclude all others is central to the federal labor policy embodied in the NLRA. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123 (1967) … Under the NLRA the employer - the NBA member team - may not bargain with any agent other than one designated by the union and must bargain with the agent chosen by the union. General Electric Co. v. NLRB, 412 F.2d 512, 517 (2nd Cir.1969); Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 63-69, 95 S.Ct. 977, 985-88, 43 L.Ed.2d 12 (1975) (Union may forbid employees or any other agent chosen by individual employees, from bargaining separately with the employer over any issue). A union may delegate some of its exclusive representational authority on terms that serve union purposes, as the NBPA has done here. The decision whether, to what extent and

> to whom to delegate that authority lies solely with the union.

Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1475 (D. Colo. 1991), aff'd 976 F.2d 740 (10th Cir. 1992) (italics in original) (underline added).

In accordance with its express powers under federal labor law to determine "whether, to what extent and to whom to delegate" its authority to negotiate individual employment contracts on behalf of NFL players, the NFLPA has established comprehensive regulations governing the conduct of its agents. Those regulations could have provided that the NFLPA reserved the right to decertify any agent for any reason or no reason at all. But the regulations are generous. They provide a comprehensive mechanism for CARD to consider whether to propose any discipline, and the agent is entitled to a full labor arbitration before an arbitrator bound by the ethical rules of the American Arbitration Association ("AAA"), in which CARD has the burden of proof and the agent is entitled to present evidence, before any discipline is imposed. The fairness of this process cannot seriously be questioned.

Under federal labor law, the unilateral appointment of an arbitrator is commonplace and perfectly lawful. See Aviall, Inc. v. Ryder System, Inc., 110 F.3d 892, 895 (2d Cir. 1997) (one party may select the arbitrator if the parties agreed to that arrangement); see also, Poston v. NFLPA, 2002 WL 31190142 (E.D. Va. Aug. 26, 2002). Black v. Nat'l Football League Players Ass'n, 87 F.Supp. 2d 1 (D.D.C. 2000), is on all fours with this case. There, William Black, a

sports agent like Mr. Poston, sued the NFLPA for proposing to revoke Mr. Black's contract advisor certification for a minimum of three years. The court explained:

> Mr. Black admits that he was aware of and freely agreed to the arbitration terms contained in the regulations, and he makes no allegation about infirmities in the drafting of the regulations. As Aviall makes clear, it is of no moment that Mr. Black did not have a hand in the structuring of the arbitration process. See Aviall, 100 F.3d at 895. An NFL-selected arbitrator may have an incentive to appease his or her employer, but "[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."

Black, 87 F.Supp. 2d at 6 (internal citation omitted) (emphasis added).

Nat'l Hockey League Players Ass'n v. Bettman, 1994 WL 738835 (S.D.N.Y. Nov. 9, 1994), is also directly on point. There, the National Hockey League Players Association sued the National Hockey League and its President and Commissioner, Gary B. Bettman, challenging the validity of two arbitral decisions by Mr. Bettman on the basis that he was inherently biased against the players. The Court rejected plaintiffs' "inherent bias" argument, based on the fact that the Players Association had agreed in the NHL CBA to have the NHL Commissioner serve as arbitrator. Bettman, 1994 WL 738835 at *13 ("These limitations on the power of the federal courts to interfere with arbitration awards based on the asserted arbitral bias are still more pronounced when the parties have agreed to a particular arbitrator or a specified method of selection that will predictably lead to arbitration by individuals with ties to one side of the controversy").

Alexander v. Minn. Vikings Football Club LLC, 649 N.W.2d 464 (Minn. Ct. App. 2002), provides a further illustration of this principle. There, NFL coaches brought a declaratory judgment action to remove the NFL Commissioner, Paul Tagliabue, as arbitrator of their disputes, arguing that it was "unfair" to allow the league to select its own Commissioner as arbitrator. The court disagreed:

> [the] appellants did not ask the district court to invalidate the arbitration clauses; they asked the district court to reform those clauses, that is, to remove Tagliabue as the arbitrator and to appoint another arbitrator … appellants cite no legal authority supporting their proposition that the district court may reform the clauses to replace Tagliabue.

Alexander, 649 N.W.2d at 967-68 (internal citation omitted).[3]

In Poston v. Nat'l Football League Players Ass'n, 2002 WL 31190142 (E.D.Va. Aug. 26, 2002), Mr. Poston brought suit to vacate Arbitrator Kaplan's award, which exonerated Mr. Poston's brother of any wrongdoing and imposed discipline on Mr. Poston to a much lesser extent than proposed by CARD. Mr. Poston argued that Arbitrator Kaplan was not neutral because he was selected by the NFLPA. Mr. Poston also argued that Arbitrator Kaplan is "regularly used by the NFLPA… [so] he is evidently partial toward the NFLPA." Poston, 2002 WL 31190142, at *2. The District Court rejected these arguments, holding that Mr. Poston failed to establish Arbitrator Kaplan's partiality. Id. at *3-4. The court also held that the award could not be vacated on the basis of bias because Mr.

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[3] See also, Madich v. North Star P'ship, 450 N.W.2d 173 (Minn. Ct. App. 1990) (NHL President could serve as arbitrator in dispute between player and club because that is what the parties agreed to in the CBA); Langevin v. Nassau Sports, 1991 WL 222437 (Minn. Ct. App. Nov. 5, 1991) (same).

Poston agreed to adhere to the Agent Regulations that permitted the NFLPA to appoint the arbitrator. Furthermore, the Court ruled that there was no evidence that Arbitrator Kaplan was biased, "particularly in light of the fact that he also works with both the National Basketball Association and Major League Baseball." Id. at *3.

As the history under its Regulations has shown, the NFLPA does not take lightly its obligation to select "a skilled and experienced person to serve as the outside impartial arbitrator" to decide agent cases. The first person chosen to serve in this capacity was former FMCS Director Ken Moffet. Mr. Moffet was succeeded by former Senator John Culver of Iowa. Arbitrator Roger Kaplan has served as the agent system arbitrator since 1994.

Mr. Kaplan, the longest tenured of the three, is a member of the National Academy of Arbitrators (and thereby bound by its Canons of Ethics) and has been performing arbitration work for over 30 years in both the public and private sectors. His credentials as an arbitrator are impeccable, and his vast experience in professional sports has included appointments to serve in professional baseball, professional basketball, and professional hockey. He has a highly specialized knowledge of the relationships between players and agents and between agents and the NFLPA.

Thanks in part to Mr. Kaplan and Messrs. Moffet and Culver, before him, the NFLPA system has served the parties well by keeping the process

inexpensive and efficient for both agents and players, while avoiding the procedural complexities and delay inherent in the court system.

Indeed, Mr. Kaplan has decided hundreds of player-agent disputes over fees and other matters, and has ruled in favor of agents far more often than not (including cases involving Carl Poston and his brother and business partner, Kevin Poston). On the disciplinary side, the record also shows that Mr. Kaplan has reduced or vacated discipline proposed by CARD more often than he has sustained it, to the obvious benefit of the agents involved. This is exemplified by his decision in a prior disciplinary case against the Postons, cited above, where he vacated the discipline against Kevin Poston and reduced Carl Poston's reprimand and fine to a reprimand.

Conclusion

The NFLPA believes that individual contract negotiations serve the interests of its members. Therefore, like sports unions in the NBA, NHL and Major League Baseball, the NFLPA has implemented an agent regulation system since 1983. It is patterned after the system in the entertainment industry and expressly endorsed by the Supreme Court in 1981, H.A. Artists & Assoc. v. Actors Equity Ass'n., 451 U.S. 704 (1981).

Finally, it bears noting that the National Football League and its Clubs recognize that the NFLPA regulates the conduct of agents who represent players' individual contract negotiations with the Clubs. The Clubs and the NFL Management Council, pursuant to the 1993 Collective Bargaining Agreement

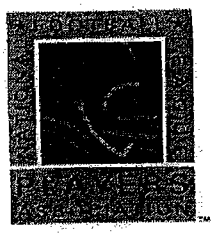
("CBA"), agree that they are prohibited from engaging in individual contract negotiations with any agent not duly certified by the NFLPA as the exclusive bargaining agent.

The CBA further provides that the NFLPA shall have sole and exclusive authority to determine the number of agents to be certified, and the grounds for withdrawing or denying certification of an agent.

Mr. Chairman, I shall be pleased to respond to questions by the Subcommittee on the NFLPA arbitration system.

Testimony of
Richard A. Berthelsen, Esq.
NFL Players Association
December 7, 2006

ATTACHMENT



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July 14, 2006

BY HAND AND FIRST-CLASS MAIL

Honorable Henry J. Hyde
Chairman, Committee on International Relations
U.S. House of Representatives
2110 Rayburn House Office Building
Washington, D.C. 20515-1306

Honorable Sheila Jackson Lee
U.S. House of Representatives
2435 Rayburn House Office Building
Washington, DC 20515-4318

Dear Chairman Hyde and Representative Jackson Lee:

Your letter inquiring about the pending discipline of Carl Poston, an agent certified by the National Football League Players Association ("NFLPA") to represent NFL players in individual salary negotiations, has been carefully reviewed with our attorneys. This response discusses the facts and circumstances of the matter as well as the NFLPA's system of agent regulation.

Pursuant to Section 9(a) the National Labor Relations Act, 29 U.S.C. § 159(a), the NFLPA is the sole, exclusive bargaining agent of players in the NFL. The NFLPA has always promoted the interests of NFL players, and takes this responsibility seriously. Recently, the NFLPA and the NFL agreed to an historic labor agreement that guarantees labor peace in professional football for many years to come, with significant increases in the overall compensation and benefits received by all NFL players.

As the NLRB-certified bargaining representative of all football players in the National Football League ("NFL"), the NFLPA could insist, under established principles of federal labor law, on exclusively bargaining all terms and conditions of employment for all NFL players, and it could exclude agents from representing players in individual contract negotiations with NFL Clubs. *J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1944). The NFLPA nevertheless believes that individual contract negotiations serve the interests of its members. To that end, the NFLPA, like the unions in the NBA, NHL and Major League Baseball, has utilized an agent-regulation system since 1983 that is patterned after the system in the entertainment industry that the Supreme Court expressly endorsed in *H.A.Artists & Assoc. v. Actors Equity Ass'n*, 451 U.S. 704 (1981).

Specifically, the NFLPA, in its sole discretion, delegates to a select group of individuals, known as "Contract Advisors," the right to represent individual players in individual salary negotiations with NFL Clubs. To become a Contract Advisor and be able to receive this delegated authority from the NFLPA, one must undergo a background examination, meet educational requirements, engage in continuing education, and agree to be bound by the NFLPA's Regulations Governing Contract Advisors (the "Regulations"). The NFLPA's Regulations have been repeatedly upheld by the federal courts. *See Black v. Nat'l Football League Players Ass'n*, 87 F.Supp. 2d 1 (D.D.C. 2000); *Poston v. Nat'l Football League Players Ass'n*, 2002 WL 31190142 (E.D.Va. Aug. 26, 2002).

Mr. Poston is a Contract Advisor and has agreed in writing to be bound by the NFLPA's Regulations. The Regulations, which were voluntarily adopted by the NFLPA, could have provided the NFLPA with the authority to decertify or suspend Contract Advisors for any reason or no reason at all, and without any hearing. But, in the spirit of fairness underlying the role of the NFLPA and labor unions generally, the Regulations are generous to the Contract Advisor by providing for a full evidentiary hearing before an arbitrator, in which the NFLPA has the burden of proof, before any discipline is imposed.

The NFLPA has selected Roger Kaplan as the arbitrator to handle cases arising under the Regulations. Arbitrator Kaplan has been a professional arbitrator since 1981 and is on the National Labor Panel of the American Arbitration Association, the Federal Mediation & Conciliation Service, and the National Mediation Board, and he is a Member of the National Academy of Arbitrators. He has heard cases arising under the Regulations since 1994, and he has served as an arbitrator involving player-club disputes arising under collective bargaining agreements in Major League Baseball, the National Basketball Association, and professional hockey.

The NFLPA's Committee on Agent Regulation and Discipline ("CARD"), in accordance with the Regulations, commenced a disciplinary proceeding against Mr. Poston in connection with his representation of an NFL player, LaVar Arrington, who is part of the NFLPA's bargaining group. Mr. Poston has admitted to the central allegations of wrongdoing made against him, namely, that he signed, initialed and certified Mr. Arrington's player contract with the Washington Redskins without reading it, only to later discover that it was missing $6.5 million in compensation to Mr. Arrington. Mr. Poston thereafter concealed his mistake from both Mr. Arrington and the NFLPA, while he secretly tried to resolve the issue with the Redskins. In response, CARD proposed that Mr. Poston be suspended for a period of two years, after which he would automatically be able to resume his role as a Contract Advisor. In making its decision, the Committee considered the fact that Mr. Poston had also been disciplined on one prior occasion, and was therefore a repeat offender under the Regulations.

Pursuant to the Regulations, Mr. Poston appealed the NFLPA's proposed suspension by commencing the arbitration proceedings now in issue. (Under the Regulations, except in extraordinary circumstances, no discipline can be imposed except by an arbitrator, and hence, Mr. Poston continues to retain his privileges as a Contract Advisor while the arbitration is pending.) Thereafter, Mr. Poston filed an action in federal court in the Southern District of New York to stay the arbitration he himself commenced. In the federal action, Mr. Poston made various claims regarding the NFLPA's disciplinary process, including that it was unfair for the arbitration to proceed in front of an arbitrator selected by the NFLPA. The Honorable Barbara S. Jones, U.S.D.J., rejected *all* of Mr. Poston's claims in a decision rendered in May of this year (a copy of the Order is attached hereto as Exh. A).

This was not the first time Mr. Poston *unsuccessfully* tried to forestall the application of the NFLPA disciplinary process against him by filing meritless litigation against the NFLPA and its agent Regulations. In *Poston v. Nat'l Football League Players Ass'n*, 2002 WL 31190142 (E.D.Va. Aug. 26, 2002), Mr. Poston brought suit to vacate the arbitrator's award in the prior disciplinary case against him and his brother. In that case, our Disciplinary Committee proved that an employee working under the direction of Carl Poston arranged for the purchase of an airline ticket for Laveranues Coles, then a player at Florida State University, in violation of NCAA rules. As a direct result, Coles was suspended from his next game, and the Committee held Mr. Poston accountable for his employee's actions by proposing a letter of reprimand and fine against Poston and his brother, who were the two principals in the sports agency in question. After hearing the evidence in the case, the Arbitrator, Roger Kaplan (the same arbitrator who is presiding over Mr. Poston's current case), exonerated Mr. Poston's brother of any wrongdoing and imposed discipline on Carl Poston to a lesser extent than proposed by CARD. Mr. Poston nonetheless challenged the result of the arbitration arguing, just as he did before Judge Jones, that Arbitrator Kaplan was not neutral because he was selected by the NFLPA. The District Court summarily rejected Mr. Poston's arguments.

Another local federal court had previously reached the same result. In *Black v. Nat'l Football League Players Ass'n*, 87 F.Supp. 2d 1 (D.D.C. 2000), William "Tank" Black, a sports agent like Mr.

Poston, sued the NFLPA for proposing to revoke his contract advisor certification for a minimum of three years. In Mr. Black's case, the arbitrator was to be Arbitrator Kaplan, the same arbitrator selected to decide Mr. Poston's recently-commenced arbitration. Mr. Black argued, just as Mr. Poston did in his prior case, that Arbitrator Kaplan was biased because he was selected by the NFLPA, and should therefore be removed. Relying on well established principles of federal law, the court soundly rejected this argument. *Black*, 87 F.Supp. 2d at 6.

When Congress passed the National Labor Relations Act and the Federal Arbitration Act, it delegated to the judicial branch responsibility for resolving private disputes that touch upon the very issues raised by Mr. Poston. Mr. Poston has availed himself of all the remedies Congress provides for him, including filing an action in federal court. Mr. Poston, pursuant to Section 10 of the Federal Arbitration Act, also will have the opportunity, should he lose the arbitration, to petition the federal court to vacate any arbitral award. In the meantime, Mr. Poston will enjoy all the rights afforded to him under the NFLPA's Regulations, as well as the protections Congress affords him in the Federal Arbitration Act.

In addition, we do not believe that the NFLPA's regulatory system raises, or can possibly raise, any antitrust concerns. In Section 6 of the Clayton Act, 15 U.S.C. § 17, Congress specifically exempted labor unions from suits under the federal antitrust laws. This conclusion is sound, since the entire purpose of unions is to permit them to act collectively on behalf of their members, with any issues of union conduct to be addressed by the exercise of union democracy and the extensive federal regulatory structure administered by the NLRB and the U.S. Department of Labor.

With the foregoing in mind, we will address each of the concerns raised in your letter. With respect to the six numbered paragraphs on the first and second pages of your letter, we note the following:

1. The right of a union representing athletes to determine who can serve as an agent is well settled under federal law. *See e.g., White v. Nat'l Football League*, 92 F. Supp. 2d 918, 924 (D. Minn. 2000). Indeed, the NFLPA has total discretion in determining whether to delegate its bargaining authority, and to whom. *See In re David Dunn*, CV 05-1000, (C.D. Cal. March 1, 2006) (Slip Op., attached as Exh. B) ("Section 9(a) of the National Labor Relations Act provides that the NFLPA's Collective Bargaining Agreement gives the NFLPA, as the exclusive bargaining representative of NFL players, *sole discretion in choosing its agents*") (emphasis added). As stated by a federal appeals court in articulating the similar labor law authority of the National Basketball Players Association ("NBPA") to delegate authority to agents:

> As the exclusive representative for all of the NBA players, the NBPA is legally entitled to forbid *any* other person or organization from negotiating for its members. Its right to exclude all others is central to the federal labor policy embodied in the NLRA. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123 (1967) ... Under the NLRA the employer - the NBA member team - may not bargain with any agent other than one designated by the union and must bargain with the agent chosen by the union. *General Electric Co. v. NLRB*, 412 F.2d 512, 517 (2nd Cir.1969); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 63-69, 95 S.Ct. 977, 985-88, 43 L.Ed.2d 12 (1975) (Union may forbid employees or any other agent chosen by individual employees, from bargaining separately with the employer over any issue). A union may delegate some of its exclusive representational authority on terms that serve union purposes, as the NBPA has done here. The

> decision whether, to what extent and to whom to delegate that authority lies solely with the union.

Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1475 (D. Colo. 1991), *aff'd* 976 F.2d 740 (10th Cir. 1992) (italics in original) (underline added).

2. Mr. Arrington has advised CARD that he did not discharge Mr. Poston because he, Mr. Poston, "admitted to his mistake." While Mr. Arrington's willingness to forgive is notable, it is not the issue. Indeed, the willingness of individual players to forgive or tolerate misconduct by agents is one of the main reasons the NFLPA's broad supervisory authority over agents is absolutely essential. The NFLPA has an obligation to ensure that its certified Contract Advisors are fit to represent *all* of its members. Mr. Poston has admitted, both to CARD and Mr. Arrington, that he certified a player contract without reading it -- a mistake that cost Mr. Arrington $6.5 million and breached his fiduciary obligations to him and to players generally. Mr. Arrington is not Mr. Poston's only client. Should Mr. Poston make a similar mistake in the future, the aggrieved player would rightly demand to know why Mr. Poston was permitted to continue to serve as an agent despite his admitted egregious conduct. The NFLPA must act to protect the interests of *all* of its members, and no one member has the right to "veto" the union's proposed discipline of an agent. Players can often be led astray, and that is precisely why the NFLPA's authority in this area is fundamental to protecting NFL players.[1] Indeed, agents such as Mr. Poston are agents of the NFLPA, first and foremost, as shown by the fact that no one can represent NFL players without the express authorization of the NFLPA consistent with its Regulations.[2]

3. It is established law, especially in the field of professional sports, that arbitration agreements permitting one side to chose the arbitrator are valid, subject to any party's right, under Section 10 of the FAA, to challenge the award on the basis of bias. *See Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892, 895 (2d Cir. 1997); *Nat'l Hockey League Players Ass'n v. Bettman*, 1994 WL 738835 (S.D.N.Y. Nov. 9, 1994); *Alexander v. Minn. Vikings Football Club LLC*, 649 N.W.2d 464 (Minn. Ct. App. 2002); *Poston v. Nat'l Football League Players Ass'n*, 2002 WL 31190142 (E.D.Va. Aug. 26, 2002); *Black v. Nat'l Football League Players Ass'n*, 87 F.Supp. 2d 1 (D.D.C. 2000). As for the payment of the arbitrator's fees, the union would be happy to share costs with the agents, but the union has undertaken to pay all such fees at the request of the agents, acting through an advisory committee. The NFLPA would not oppose an offer from Mr. Poston to have Mr. Poston pay half of Arbitrator Kaplan's fees in this case.

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1 As the District Court in the *Collins* case noted, sports unions regulate the conduct of agents because there is a history of agents leading players astray and taking advantage of them. *See Collins v. National Basketball Players Association*, 850 F. Supp. 1468, 1471 (D. Colo. 1991) ("players complained that the agents imposed high and non-uniform fees for negotiation services, insisted on the execution of open-ended powers of attorney giving the agents broad powers over players' professional and financial decisions, failed to keep players apprised of the status of negotiations with NBA teams, failed to submit itemized bills for fees and services, and, in some cases, had conflicts of interest arising out of representing coaches and/or general managers of NBA teams as well as players. Many players believed they were bound by contract not to dismiss their agents regardless of dissatisfaction with their services and fees, because the agents had insisted on the execution of long-term agreements. Some agents offered money and other inducements to players, their families and coaches to obtain player clients. In response to these abuses, the NBPA established the Regulations, a comprehensive system of agent certification and regulation, to insure that players would receive agent services that meet minimum standards of quality ...").

2 This is quite analogous, in fact, to disciplinary procedures against attorneys by the bar, where the proposed suspension of an attorney does not depend upon the complaint of a client. It is instead the protection of all other existing or potential clients that is at stake.

4. As set forth above, Arbitrator Kaplan is an experienced arbitrator, and the courts have uniformly upheld arbitration agreements where one side is authorized to select an arbitrator, subject to each party's rights under Section 10 of the FAA to challenge the award.

5. The mention of Mr. Poston's race in your letter is unfortunate. The NFLPA does not discriminate against African Americans. I, a majority of our Board of Player Representatives, and a majority of the Committee on Agent Regulation and Discipline, are African Americans. The NFLPA cannot create exceptions to its procedures and programs based upon race or ethnicity because to do so could violate the law. Further, ignoring the misconduct of an African American agent because of his race will not further our common goal of eradicating discrimination from our society. In addition, while Mr. Poston may have been successful in obtaining contracts for many of his clients, he has not increased the income of NFL players. Rather, the amount of money paid to all players is negotiated by the NFLPA and NFL at the bargaining table. The NFLPA has secured approximately $3.2 billion per year to be paid to players under the most recently negotiated extension of the CBA. Mr. Poston, like other agents, will try to obtain the biggest piece of that pie for his clients, but the salaries paid to NFL players globally is not determined by agents, but by what the NFLPA can obtain at the bargaining table. The NFLPA has been effective and responsible in its role as the exclusive bargaining representative for all NFL players, and Mr. Poston's role in the process is limited and should be kept in perspective.

With respect to the seven numbered paragraphs on the second and third pages of your letter, we note the following:

1. The Regulations do require that disciplinary complaints issued by CARD be based upon verified information. Here, CARD's complaint was based upon information which Poston himself verified. Mr. Poston has admitted to engaging in the conduct alleged in the complaint. The question of "verification" is therefore not an issue.

2. We believe that Arbitrator Kaplan is neutral, impartial and unbiased. Indeed, he has ruled partially in favor of Mr. Poston, and his brother Kevin Poston, in an earlier disciplinary matter, eliminating any fine against Mr. Poston and dismissing the complaint against Kevin Poston altogether. Mr. Kaplan has also ruled in favor of Mr. Poston in fee disputes with his player-clients. Federal courts have upheld Arbitrator Kaplan's decisions, finding that he is not at all biased. Further, it is important to have a single arbitrator, to ensure that discipline is uniform and that the Arbitrator applies what the Supreme Court has called the "law of the shop." As stated last year by one court in a case involving arbitrations in the NBA:

> The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed ... parties have bargained for a decision by an arbitrator because they thus have the benefit of his creativity and expertise that are in no small measure due to his knowledge of and familiarity with the industry and shop practices constituting the environment ...

Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, 2005 WL 22869, at *7 (S.D.N.Y. Jan. 3, 2005) (citations omitted). A system involving a number of different arbitrators who have little or no experience in this very unique field would be cumbersome and lead to inconsistent discipline.

3. This is addressed in "3" above.

4. The Regulations do not specifically address discovery, but Arbitrator Kaplan typically permits document discovery, consistent with the expedited nature of arbitration. Moreover, Mr. Poston has not sought any discovery in this case under any appropriate procedures, apparently preferring instead to focus his resources on delaying the application of the NFLPA's disciplinary process against him through meritless federal lawsuits, and urging members of Congress to take actions which would amount to an amendment of the NLRA, the Clayton Act and the FAA to help his case. In any event, it is not correct that discovery is typically available in arbitration. Indeed, the American Arbitration Association ("AAA") has over a dozen different sets of arbitration rules, and many, if not most of them, such as the Labor Arbitration Rules, provide for no discovery at all. Other AAA rules, such as the Employment Dispute Rules, permit discovery only at the direction of the arbitrator. We therefore believe that Arbitrator's Kaplan's conduct of arbitrations, as well as CARD's Regulations, provide at least as much discovery and due process as that afforded elsewhere. Moreover, it must be recognized that arbitration is typically seen (and therefore encouraged by the courts) as a less expensive and less time-consuming alternative to litigation in the state or federal courts. As recognized by the U.S. Court of Appeals for the Fourth Circuit in a highly relevant case (this arbitration is being conducted in Virginia), parties to arbitration relinquish "certain procedural niceties" to promote the "speed, efficiency and reduction of litigation expenses" that are the "hallmarks" of arbitration. *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999).

5. There are no surprises at CARD hearings. Typically, as in Mr. Poston's case, CARD's complaint contains a detailed account of the facts at issue, and a precise description of the alleged misconduct and the particular Regulations that the agent is alleged to have breached. Moreover, the types of pre-hearing disclosures you reference are not required by AAA rules.

6. The Regulations do not address subpoenas one way or another, but do not alter the traditional use of subpoenas in arbitrations. Generally, as a legal matter, arbitrators are permitted under the FAA to issue subpoenas to compel attendance at an arbitration hearing, although there is conflicting precedent as to the extent of the arbitrator's authority to do so, or to order pre-hearing third party discovery by way of subpoena.

We are proud of our agent regulation system and believe that it works well. It is critical to the ability of the NFLPA, as the exclusive collective bargaining representative of NFL players, to protect players from agents who unfortunately may breach their duties to represent players under the NFLPA's Regulations. Only our governing body, the NFLPA Board of Player Representatives, has the authority to change those Regulations, and I will therefore share your comments with the Board at its next meeting. Meanwhile, however, it is the job of myself and my staff to enforce the Regulations as written.

Respectfully,

Gene Upshaw/pp

Eugene Upshaw

Enclosures.

CHAMBERS OF
HON. BARBARA S. JONES
UNITED STATES DISTRICT COURT
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NEW YORK, NEW YORK 10007
TEL: (212) 805-6186
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MAY 1, 2006

FAX COVER SHEET

To: Paul Aloe
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Fax: 212-259-6333

RE: POSTON V. NFLPA
06 CV 2249

THIS PAGE AND 2 OTHERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL POSTON,	:	
	:	
Plaintiff,	:	06 Civ. 2249(BSJ)
	:	
v.	:	
	:	**ORDER**
NFL PLAYERS ASSOCIATION,	:	
	:	
Defendant.	:	

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

On April 20, 2006, this Court heard argument on Plaintiff's motion for a stay of the arbitration pending between the parties. For purposes of this order, familiarity with the facts is assumed.

Plaintiff has failed to demonstrate that he will be irreparably harmed absent the stay he seeks. *See Emery Air Freight Corp. v. Local Union 295*, 786 F.2d 93, 100-01 (2d Cir. 1986) (being compelled to arbitrate not irreparable harm); *see also Woodlawn Cemetery v. Local 365*, 930 F.2d 154, 157 (2d Cir. 1991) (finding that enforcement of collective bargaining agreement compelling arbitration would work irreparable harm because of the "extraordinarily rare" circumstance that same matter had already been fully argued in separate arbitration before National Labor Relations Board, whose decision was pending).

Plaintiff has also failed to show that he is likely to succeed on the merits of his claim here. Plaintiff admits that the subject matter of the disciplinary complaint against him is arbitrable. Therefore his argument, that procedural issues arising out of the prosecution of that complaint are not arbitrable, is without merit. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).

Plaintiff has thus failed to meet his burden to obtain an injunction against the pending arbitration. *See, e.g., Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992). The motion is accordingly DENIED.

SO ORDERED:

Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Dated: May 1, 2006
New York, New York

2/4/03
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THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Steinberg, Moorad & Dunn, Inc.,

Plaintiff,

v.

David L. Dunn, Athletes First, LLC, David C. Hunnewell, Centurion Capital Management, LLC, Platinum Equity, LLC, Donald Housman, Broad Opportunity Yield System, LLC (a/k/a BOYS),

Defendants.

CV 01-7009 RSWL (RZx)

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFF STEINBERG, MOORAD & DUNN INC.'S REQUESTED INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff Steinberg, Moorad & Dunn, Inc.'s ("SMD") Request for Injunctive and Other Equitable Relief came on hearing before the Honorable Roald S.W. Lew on January 8, 2003 at 10:00 a.m. Having fully considered the papers

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submitted in support of and in opposition to Plaintiff's Requests, as well as counsels' arguments offered in connection therewith, this Court finds the following:

A jury has found Defendant David Dunn liable on Plaintiff'S claims for Breach of Contract, Unfair Competition, Tortious Inducement of Breach of Contract, and Tortious Interference with Prospective Economic Advantage and awarded Two Million Dollars ($2,000,000) in compensatory damages, as well as Two Million Six Hundred Sixty Thousand Dollars ($2,660,000) in punitive damages.

Defendant Athletes First was found liable for Unfair Competition, Tortious Inducement of Breach of Contract, and Tortious Interference with Prospective Economic Advantage. The jury awarded Plaintiff Twenty Million ($20,000,000) in compensatory damages plus Twenty Million ($20,000,000) in punitive damages on these claims.

Now sitting as a Court of Equity, the Court will consider Plaintiff's remaining equitable claims.

REGARDING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF

The Court hereby determines that the permanent injunction requested by Plaintiff is not equitable.

The conduct at issue in this case occurred almost two years ago, and Plaintiff has not shown that Dunn and Athletes First will engage in future acts of this kind.

The jury award explicitly compensates SMD for the claims against Dunn and Athletes First.

Plaintiff's requested injunction would prevent Dunn from earning a living in the profession of his choice and prevent athletes from having the representation of their choice.

Although the Intervenor National Football League Players Association ("NFLPA"), in its Motion for Partial Summary Judgment, did not demonstrate that the injunctive relief sought was barred by Federal Labor Law, including §9(a) of the National Labor Relations Act, the facts currently before the Court support a denial of the injunction on this ground as well.

The Court finds that the NFLPA is the exclusive representative of NFL players, and that it delegates a portion of such authority to Certified Contract Agents to negotiate on behalf of the players. The proposed injunction would impermissibly usurp that statutory authority by denying the NFLPA the right to appoint or decertify Certified Contract Advisors according to its own regulations.

Therefore, due to a failure of likelihood of success on the merits and of a finding of irreparable injury, the requested injunctive relief, including the requested Permanent Injunction to prevent future unfair competition by Athletes First and Dunn, and seeking specific performance of

Dunn's Employment Agreements, is DENIED.

REGARDING PLAINTIFF'S REQUEST FOR UNJUST ENRICHMENT, CONSTRUCTIVE TRUST AND AN ACCOUNTING

The jury verdict adequately compensated Plaintiff for the damages it suffered as a result of Defendants' conduct. Plaintiff has not adequately shown that the Defendants have been enriched beyond what the jury awarded.

Plaintiff's argument to base an unjust enrichment award on the potential worth of Athletes First at its creation to determine the amount Defendants actually gained from their acts is improper.

Therefore, because Plaintiff has not shown, and the Court does not find, that Defendants have benefitted from their conduct beyond what has already been awarded to Plaintiff, the claim for Unjust Enrichment is **DENIED**.

Because the Court has ruled that an unjust enrichment award is not appropriate, neither a constructive trust nor an accounting is necessary, and both are hereby **DENIED**.

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REGARDING PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF

Plaintiff is entitled to judgment against Defendant Dunn on the Breach of Contract claim. Therefore, Plaintiff's request for a Declaration that David Dunn's Employment Agreement with SMD is valid is hereby GRANTED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Court will exercise its discretion to stay execution of the judgment in this case until all post-trial motions are heard and the final judgment is entered.

RONALD S.W. LEW

RONALD S.W. LEW
United States District Judge

DATED: Feb 4, 2003